Sundra Rajoo a/l Nadarajah v Menteri Hal Ehwal Luar Negeri, Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA 25–108–03 OF 2019
MARIANA YAHYA J
6 MARCH 2020

Administrative Law — Judicial review — Application for leave — Applicant sought to assert immunity from any suit or legal process in respect of acts done in capacity as director of Asian International Arbitration Centre (Malaysia) — hether applicant entitled for immunity — Whether immunity could be waived — Whether decision of second respondent amenable to judicial review — International Organizations (Privileges and Immunities) Act 1992 ss 4(1)(b)(ii) & 4(7)

This was the applicant's application for judicial review under O 53 r 2 of the Rules of Court 2012 to seek declaratory and related relief to assert his immunity from any suit or legal process in respect of acts done in his capacity as the director of the Asian International Arbitration Centre (Malaysia) ('AIAC') from 1 March 2010 to 21 November 2018. The AIAC was established in 1978 by an exchange of diplomatic letters. The first formal agreement was entered between the Government of Malaysia ('the fourth respondent') and the Asian-African Legal Consultative Organization ('AALCO') on 29 July 1981. The latest agreement currently in force was the agreement dated 26 March 2013 ('the 2013 Host Country Agreement'). The office of the director and the AIAC came under the auspices of the AALCO, and the 2013 Host Country Agreement required the fourth respondent to treat the AIAC as an international organisation and its premises and activities inviolable. The AIAC was raided on 19 November 2018 and documents were seized from the office. On the next day, the applicant was arrested by the Malaysia Anti-Corruption Commission ('the third respondent'). The applicant was brought to the magistrate's court, where the prosecutor applied for a seven days remand order. However, the application was dismissed inter alia because of the applicant's immunity. No appeal was filed by the third respondent against that order. This provided the foundation for judicial review in the High Court as the applicant submitted all of this, was in breach of the law, and a breach of the 2013 Host Country Agreement despite that those immunities provided under the law. At the same time, the Minister of Foreign Affairs of the Government of Malaysia ('the first respondent') and the Attorney General of Malaysia ('the second respondent') sought waivers of the applicant's immunity but refused by AALCO. The second respondent nonetheless proceeded with charges against the applicant a day before the leave application for judicial review was set for

hearing. The leave application was refused by the learned High Court judge. Dissatisfied, the applicant filed an appeal to the Court of Appeal on the said decision. The High Court's decision was unanimously overturned by the Court of Appeal which granted leave to the applicant to apply for judicial review and remitted the case to High Court to hear the substantive application before a different judge, which was now before this court.

Held, allowing the application:

(1) From the plain reading of s 4(7) of International Organizations (Privileges and Immunities) Act 1992 ('Act 485'), generally there was no immunity to be accorded to the High Officer or officer of an international organization if he was a citizen of Malaysia except in respect of 'acts and things done in his capacity as such an officer'. Since the applicant was a Malaysian citizen and both parties ie the fourth respondent and AALCO agreed to be bound by the provisions in the 2013 Host Country Agreement which was subjected to Act 485, therefore the privileges or immunities in the Second and Fourth Schedules were still applicable provided the acts or things done was in his capacity as such an officer. Pursuant to s 4(1)(b)(ii) of Act 485, the applicant still enjoyed immunities as provided under Part II of the Schedule. In addition to that, the applicant in his amended statement only sought for a declaration as a former High Officer and thus parties were bound by their pleadings. The wording in Part I and Part II of the Second Schedule of Act 485 had been crafted and distinguished from one another. This showed that the Parliament intended to differentiate the immunities enjoy by the High Officer and former High Officer. The immunity that guaranteed by Part II of the Second Schedule Act 485 was that the applicant was immune from suit and other legal process in respect of acts and things done in his capacity as such an officer. Legal process meant civil and criminal process. If Parliament had intended to exclude the immunity from criminal process then it had to be specifically spelled out in Part II of the Second Schedule of Act 485. The limits of immunities provided for a former High Officer was very clear that he was immune from suit and other legal process in respect of acts and things done in his capacity as such an officer unlike a High Officer who enjoyed privileges and immunities as were accorded to a diplomatic agent (see paras 59, 60–62, 67–68 & 71).

(2) The immunity was never cancelled or challenged, thus the immunity conferred on the applicant remained. The applicant was the representatives of the international organization under the auspices of the AALCO. The respondents recognize the privileges and immunities of the applicant. The respondents' request for a waiver of the applicant's immunity was rejected by AALCO. In such circumstances, the applicant's immunity provided under Second Schedule of Act 485 was

still maintained till to date. All the terms/articles in the 2013 Host Country Agreement must be honoured by the parties including the fourth respondent. There was evidence from AALCO through its letter which condoned that the acts and things done which formed the charges levelled against the applicant were in fact done in the applicant's capacity as such an officer. The court could not simply disregard such evidence as it was from the organization which had the sole power to waive the immunity given to the applicant under the 2013 Host Country Agreement. Further, the evidence that the applicant had never took the profit from the sales of the book and that he had refunded the same to the AIAC was never rebutted by the respondents (see paras 73–79).

(3) A discretionary power vested in the second respondent, whether by way of statute or prerogative was subjected to legal limits. The second respondent as a public officer must act according to law. The second respondent's discretionary power to prefer charges against the applicant under the criminal jurisdiction of the state must be subjected to the privileges and immunities conferred upon and vested with the applicant in the various domestic laws and regulations (see paras 85–86).

(4) No explanation had been given as to why the second and the third respondents could not wait until the AALCO's Secretary General had responded to their letters seeking waiver, nor why they could not await the determination of the judicial review application. The judicial review was in respect of not only the decision of the public prosecutor, but also 'things done in the exercise of a public function' by the first, second and third respondents. The applicant had come to the right court to determine if the executive branch of government had acted beyond its powers (see paras 88 & 90).

[Bahasa Malaysia summary

Ini adalah permohonan pemohon untuk semakan kehakiman di bawah A 53 k 2 Kaedah-Kaedah Mahkamah 2012 untuk memohon relif pengisytiharan dan yang berkaitan untuk menegaskan kekebalannya dari apa-apa tuntutan atau proses undang-undang berkenaan dengan tindakan yang dilakukan atas kemampuannya sebagai pengarah Pusat Timbang Tara Antarabangsa Asia (Malaysia) ('AIAC') dari 1 Mac 2010 hingga 21 November 2018. AIAC ditubuhkan pada tahun 1978 dengan pertukaran surat diplomatik. Perjanjian formal pertama telah dimeterai antara Kerajaan Malaysia ('responden keempat') dan Jawatankuasa Perundingan Undang-Undang Asia-Afrika ('AALCO') pada 29 Julai 1981. Perjanjian terbaru yang sedang berkuat kuasa adalah perjanjian bertarikh 26 Mac 2013 ('Perjanjian Negara Tuan Rumah 2013'). Pejabat pengarah dan AIAC berada di bawah naungan AALCO, dan Perjanjian Negara Tuan Rumah 2013 mewajibkan responden keempat untuk memperlakukan AIAC sebagai organisasi antarabangsa dan premis dan kegiatannya tidak dapat dilanggar. AIAC diserbu pada 19 November 2018 dan

dokumen dirampas dari pejabat. Pada keesokan harinya, pemohon ditangkap oleh Suruhanjaya Pencegahan Rasuah Malaysia ('responden ketiga'). Pemohon dibawa ke mahkamah majistret, di mana pihak pendakwaan memohon perintah tahanan reman selama tujuh hari. Bagaimanapun, permohonan itu ditolak antara lain kerana kekebalan pemohon. Tidak ada rayuan yang diajukan oleh responden ketiga terhadap perintah itu. Ini memberikan asas untuk semakan kehakiman di Mahkamah Tinggi kerana pemohon mengemukakan bahaw semua ini, melanggar undang-undang, dan melanggar Perjanjian Negara Tuan Rumah 2013 walaupun kekebalan itu diperuntukkan di bawah undang-undang. Pada masa yang sama, Menteri Luar Negeri Kerajaan Malaysia ('responden pertama') dan Peguam Negara Malaysia ('responden kedua') meminta pengecualian kekebalan pemohon tetapi ditolak oleh AALCO. Walau bagaimanapun, responden kedua meneruskan tuduhan terhadap pemohon sehari sebelum permohonan kebenaran untuk semakan kehakiman ditetapkan untuk didengar. Permohonan kebenaran ditolak oleh hakim Mahkamah Tinggi yang bijaksana. Tidak berpuas hati, pemohon memfailkan rayuan ke Mahkamah Rayuan atas keputusan tersebut. Keputusan Mahkamah Tinggi dibatalkan sebulat suara oleh Mahkamah Rayuan yang memberikan kebenaran kepada pemohon untuk memohon semakan kehakiman dan menyerahkan kes itu ke Mahkamah Tinggi untuk mendengar permohonan substantif di hadapan hakim yang berbeza, yang sekarang dihadapkan ke mahkamah ini.

Diputuskan, membenarkan permohonan:

(1) Daripada pembacaan secara jelas s 4(7) Akta Organisasi Antarabangsa (Keistimewaan dan Kekebalan) 1992 ('Akta 485'), secara umum tidak ada kekebalan yang akan diberikan kepada Pegawai Tinggi atau pegawai organisasi antarabangsa jika beliau adalah warganegara Malaysia kecuali berkenaan dengan 'tindakan dan perkara yang dilakukan mengikut kemampuannya sebagai pegawai itu'. Oleh kerana pemohon adalah warganegara Malaysia dan kedua-dua pihak iaitu responden keempat dan AALCO bersetuju untuk terikat dengan peruntukan dalam Perjanjian Negara Tuan Rumah 2013 yang tertakluk kepada Akta 485, oleh itu hak istimewa atau kekebalan dalam Jadual Kedua dan Keempat masih terpakai dengan syarat tindakan atau perkara yang dilakukan adalah mengikut kemampuannya sebagai pegawai itu. Berdasarkan s 4(1)(b)(ii) Akta 485, pemohon masih menikmati kekebalan seperti yang diperuntukkan di bawah Bahagian II Jadual. Selain itu, pemohon dalam pernyataannya yang dipinda hanya meminta pengisytiharan sebagai bekas Pegawai Tinggi dan dengan itu pihak-pihak terikat dengan pliding mereka. Perkataan dalam Bahagian I dan Bahagian II Jadual Kedua Akta 485 telah dibuat dan dibezakan antara satu sama lain. Ini menunjukkan bahawa Parlimen bertujuan untuk membezakan kekebalan yang dinikmati oleh Pegawai Tinggi dan bekas Pegawai Tinggi. Kekebalan

yang dijamin oleh Bahagian II Akta Jadual Kedua 485 adalah bahawa pemohon kebal dari guaman dan proses undang-undang lain berkenaan dengan tindakan dan perkara yang dilakukan sesuai dengan kemampuannya sebagai pegawai. Proses undang-undang bermaksud proses sivil dan jenayah. Sekiranya Parlimen berniat mengecualikan kekebalan dari proses jenayah, maka itu harus dijelaskan secara khusus dalam Bahagian II Jadual Kedua Akta 485. Batasan kekebalan yang diperuntukkan bagi seorang bekas Pegawai Tinggi sangat jelas bahawa dia kebal dari tindakan guaman dan proses undang-undang lain berkenaan dengan tindakan dan perkara yang dilakukan sesuai dengan kemampuannya sebagai pegawai tidak seperti Pegawai Tinggi yang menikmati hak istimewa dan kekebalan sebagaimana yang diberikan kepada ejen diplomatik (lihat perenggan 59, 60–62, 67–68 & 71).

(2) Kekebalan tidak pernah dibatalkan atau dicabar, oleh itu kekebalan yang diberikan kepada pemohon tetap ada. Pemohon adalah wakil organisasi antarabangsa di bawah naungan AALCO. Responden menyedari hak istimewa dan kekebalan pemohon. Permintaan responden untuk pengecualian kekebalan pemohon ditolak oleh AALCO. Dalam keadaan seperti itu, kekebalan pemohon yang diperuntukkan di bawah Jadual Kedua Akta 485 masih dikekalkan hingga kini. Semua terma/artikel dalam Perjanjian Negara Tuan Rumah 2013 mesti dipatuhi oleh pihak-pihak termasuk responden keempat. Terdapat bukti dari AALCO melalui suratnya yang membenarkan bahawa tindakan dan perkara yang dilakukan yang membentuk tuduhan yang dikenakan terhadap pemohon sebenarnya dilakukan atas kemampuan pemohon sebagai pegawai. Mahkamah tidak boleh dengan mudah mengabaikan bukti yang ada dari organisasi yang mempunyai satu-satunya kuasa untuk mengetepikan kekebalan yang diberikan kepada pemohon berdasarkan Perjanjian Negara Tuan Rumah 2013. Selanjutnya, bukti bahawa pemohon tidak pernah mengambil keuntungan dari penjualan buku dan bahawa dia telah mengembalikan yang sama kepada AIAC tidak pernah dibantah oleh responden (lihat perenggan 73–79).

(3) Kuasa budi bicara yang diberikan oleh responden kedua, sama ada melalui undang-undang atau hak prerogatif dikenakan batasan undang-undang. Responden kedua sebagai pegawai awam mesti bertindak mengikut undang-undang. Kuasa budi bicara responden kedua untuk memilih tuduhan terhadap pemohon di bawah bidang kuasa jenayah negara mesti tertakluk kepada hak istimewa dan kekebalan yang diberikan dan diberikan kepada pemohon dalam berbagai undang-undang dan peraturan domestik (lihat perenggan 85–86).

(4) Tidak ada penjelasan mengenai mengapa responden kedua dan ketiga tidak boleh menunggu sehingga Setiausaha Agung AALCO menjawab surat mereka memohon pengecualian, atau mengapa mereka tidak boleh

menunggu penentuan permohonan semakan kehakiman. Semakan kehakiman bukan hanya berkaitan dengan keputusan pihak pendakwaan, tetapi juga 'hal-hal yang dilakukan dalam menjalankan fungsi awam' oleh responden pertama, kedua dan ketiga. Pemohon telah datang ke mahkamah yang betul untuk menentukan jika bahagian eksekutif kerajaan telah bertindak di luar kuasanya (lihat perenggan 88 & 90).]

Cases referred to

Dato' Seri Anwar Ibrahim v Mohamad Hanafiah bin Hj Zakaria & Ors [2010] 2 MLJ 271, HC (refd)

Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor [2010] MLJU 653; [2010] 8 CLJ 173, HC (refd)

Long bin Samat v PP [1974] 2 MLJ 152, FC (refd)

Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 6 MLJ 468; [2013] 8 CLJ 890, CA (refd)

Mohit v The Director of Public Prosecutions of Mauritius [2006] 1 WLR 3343, PC (refd)

Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)

Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lembah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

R Rama Chandran v Industrial Court Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Regional Centre for Arbitration v Ooi Beng Choo & Anor Civil Appeal No W-01–160 of 1998 (unreported), CA (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)

Tan Seet Eng v Attorney General and another matter [2016] 1 SLR 779, CA (refd)

Legislation referred to

Diplomatic Privileges (Vienna Convention) Act 1966 Schedule

Federal Constitution art 145(3)

Industrial Relations Act 1967

International Organizations (Privileges and Immunities) Act 1992 ss 2, 4(1)(b)(i), (1)(b)(ii), (7), 8A, 8A(1), (2), 4(7), Second Schedule, Fourth Schedule

Islamic Financial Services Board Act 2002 s 7, Schedule

Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996

Malaysian Anti-Corruption Commission Act 2009

Rules of Court 2012 O 53 r 2, 2(4)

K Shanmuga (Abdul Shukor Ahmad, Baljit Singh, Ankit Singh and Dinesh Kumar with him) (Kanaselingam & Co) for the applicant.
Narkunavathy Sundaresan (Natra Idris and Suzana Atan with him) (Senior Federal Counsel, Attorney's General Chambers) for the respondents.

Mariana Yahya J:

INTRODUCTION

[1] This is the applicant's application for judicial review under O 53 r 2 of the Rules of Court 2012 to seek declaratory and related relief to assert his immunity from any suit or legal process in respect of acts done in his capacity as the Director of the Asian International Arbitration Centre (Malaysia) ('AIAC') (formerly known as the Kuala Lumpur Regional Centre for Arbitration). Vide the amendment statement (encl 32), the applicant sought for the following reliefs:

(a) a declaration that the applicant has immunity as a former High Officer being the Director of the Asian International Arbitration Centre ('the centre') for acts done within his capacity as High Officer;

(b) a declaration that on a proper interpretation of Act 485, the applicant's immunity as a former high officer cannot be waived;

(c) a declaration that in any event a director, acting director or any other officer of the centre or otherwise has no power to waive the applicant's immunity;

(d) an order of certiorari to remove into the High Court and quashed forthwith all the existing criminal charges brought against the applicant in Kuala Lumpur Sessions Court No WA-62R-15–03 of 2019;

(e) an order of prohibition preventing the second respondent from laying any charge or bringing any proceedings or continuing the proceedings in WA-62R-15–03 of 2019 or any other proceedings in any court in Malaysia against the applicant with regard to anything done by the applicant in his capacity as Director of the Centre, and more specifically with regard to any acts or omissions by the applicant during his term of office as Director of the Centre in relation to the property, funds or documents of the centre or otherwise howsoever in relation to the affairs of the centre;

(f) an order of prohibition preventing the third respondent from arresting, detaining, issuing any warrant or other order or otherwise bringing any judicial proceedings whatsoever against the applicant with regard to anything done by the applicant in his capacity as Director of the Centre, and more specifically with regard to any acts or omissions by the

applicant during his term of office as Director of the Centre in relation to the property, funds or documents of the centre or otherwise howsoever in relation to the affairs of the centre;

(g) an order of certiorari to remove into the High Court and quash forthwith any document purporting to waive the applicant's immunity; and

(h) such further or other relief as is considered just by this honourable court.

SALIENT FACTS

[2] The applicant is a Malaysian citizen who served as Director of the Asian International Arbitration Centre (Malaysia) (formerly known as the Kuala Lumpur Regional Centre for Arbitration) ('the centre' or 'the AIAC') from 1 March 2010 to 21 November 2018.

[3] The first respondent is the Minister of Foreign Affairs of the Government of Malaysia, the second respondent is the Attorney General of Malaysia and the third respondent is a statutory body established under the Malaysian Anti-Corruption Commission Act 2009 ('Act 694').

[4] The centre was established in 1978 by an exchange of diplomatic letters. Later, the first formal agreement known as the Agreement Between Government of Malaysia and the Asian-African Legal Consultative Committee Relating to the Regional Centre for Arbitration in Kuala Lumpur was entered between the fourth respondent and the Asian-African Legal Consultative Organization ('AALCO') on 29 July 1981 ('the 1981 host country agreement').

[5] The latest agreement currently in force is the agreement Between Government of Malaysia and the Asian-African Legal Consultative Committee Relating to the Regional Centre for Arbitration in Kuala Lumpur dated 26 March 2013 ('the 2013 host agreement'), as varied purely in relation to change of name of the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') to AIAC vide the supplementary agreement entered between the fourth respondent and AALCO in 2018 ('the 2018 supplementary agreement'). The office of the Director and the AIAC comes under the auspices of AALCO, and the 2013 host country agreement requires the fourth respondent to treat the AIAC as an international organisation and its premises and activities inviolable.

[6] The AIAC was raided on 19 November 2018 and documents were seized from the office. On the next day, the applicant was arrested by the third respondent at the Kuala Lumpur International Airport. The applicant was brought to the magistrate's court, where the prosecutor applied for a seven days remand order. However, the learned magistrate dismissed the remand

A application, inter alia, because of the applicant's immunity. No appeal was filed by the third respondent against that order.

B **[7]** Thus, this provides the foundation for judicial review as the applicant submitted all of this, was in breach of the law, and a breach of the 2013 host country agreement despite that those immunities provided under the law.

C **[8]** On 6 March 2019, the applicant filed an application for leave for judicial review in the High Court to assert his immunity from suit and other legal process. The leave application was fixed for hearing on Tuesday, 26 March 2019. At the same time, the first respondent and the second respondent sought waivers of the applicant's immunity.

D **[9]** AALCO replied to their letters via a letter dated 22 March 2019 refusing to waive the applicant's immunity which had now enjoyed by him. The second respondent nonetheless proceeded with the charges against the applicant.

E **[10]** On 22 March 2019, the second respondent gave consent to prosecute the applicant despite refusal of waiver of immunity and this pending judicial review application.

F **[11]** The prosecution proceeded to file three criminal charges against the applicant in Kuala Lumpur Sessions Court a day before the leave application for judicial review was set for hearing ie on 25 March 2019.

G **[12]** The applicant was accused of criminal breach of trust because he allegedly authorised monies belonging to AIAC to be spent to purchase a book authored by him and published by publishing company, Lexis Nexis. The books that were purchased were then distributed by the AIAC as part of AIAC's promotional activity.

H **[13]** The applicant claimed that AALCO was aware of this promotional activity and the applicant has agreed to pay the royalties earned by him from those books to be donated back to the AIAC at all material times.

I **[14]** The leave application was refused on 26 March 2019 by the learned High Court judge. Dissatisfied with the High Court's decision, the applicant filed an appeal to the Court of Appeal on the said decision. The High Court's decision was unanimously overturned by the Court of Appeal which granted leave to the applicant to apply for judicial review and remitted the case to High Court to hear the substantive application before a different judge, which is now before me.

[15] The crux of the applicant's case for judicial review is as follows:

(a) whether the second respondent as the state authority is bound in law by the international regime of privileges and immunities which have been incorporated in and are part of our domestic laws; and

(b) as the 'Director' of AIAC, pursuant to the International Organizations (Privileges and Immunities) Act 1992 ('Act 485'), the applicant is conferred the status of a 'High Officer.' As a high officer, he enjoyed the like privileges as a 'diplomatic agent' within the meaning of the Diplomatic Privileges (Vienna Convention) Act 1966 ('Act 636'). Now, as a former high officer, the applicant is conferred by law 'immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer'.

THE APPLICANT'S SUBMISSIONS

AALCO letter

[16] It is the applicant's submission that AALCO has issued three letters to the respondents refusing to waive the applicant's immunity and protesting and disassociating themselves from the criminal charges. The first letter was sent to the first respondent on 22 March 2019 and the two other letters were addressed to the second respondent on 3 April 2019 and on 10 July 2019 respectively.

[17] The applicant further submmited that in these three letters, AALCO gave a reasoned rejection to the request for a waiver of the applicant's immunity. AALCO had also expressed their strong protest and surprise at the second respondent's decision to prosecute the applicant notwithstanding his immunity under the law and AALCO's refusal to grant a waiver of the said immunity. Despite that, none of the AALCO letters were replied by the respondents.

Privileges and immunities conferred upon and vested with the applicant

[18] The privileges and immunities conferred upon and vested with the applicant by virtue of him being the former Director of AIAC stems from the following statutes and international agreements, namely:

(a) International Organizations (Privileges and Immunities) Act 1992 ('Act 485'); and

(b) Diplomatic Privileges (Vienna Convention) Act 1966 ('Act 636');

(c) Kuala Lumpur Regional Centre for Arbitration (Privileges and Immunities) Regulations 1996 ('the 1996 Regulations') as amended by the Kuala Lumpur Regional Centre for Arbitration (Privileges and

A Immunities) (Amendment) Regulations 2011 ('2011 Regulations'); and

(d) the host country agreement between the Government of Malaysia and the Asian-African Legal Consultative Organization dated 26 March 2013 relating to the Regional Centre for Arbitration in Kuala Lumpur ('the 2013 host country agreement').

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[19] The 2013 host country agreement in article III, para 6, states that the Director of the centre, if he is a citizen of Malaysia, shall be entitled to such privileges and immunities as determined by the Minister pursuant to Act 485.

C

[20] Section 4(1)(b)(i) and (1)(b)(ii) of Act 485 states that the Minister may by regulations confer upon a person who is, or is performing the duties of, a high officer (or has ceased to so act) the immunities specified in Parts I and II and of the Second Schedule.

D

[21] Immunity was conferred on the applicant by the 2011 Regulations, the relevant parts of which state as follows:

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> 1A. 'High Officer' means the person for the time being holding the post of the Director of the Kuala Lumpur Regional Centre for Arbitration.'
>
> ...
>
> 3A(2). A High Officer, if he is a citizen of Malaysia, shall only be entitled to the privileges and immunities in respect of acts and things done in his capacity as the High Officer.

F

[22] Section 2 of Act 485 also provides the following definitions:

(a) 'diplomatic agent' has the same meaning assigned to it by the Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636); and

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(b) 'high officer' means a person who holds, or is performing the duties of, an office prescribed by regulations to be a high officer in an international organisation.

H

[23] Act 636 incorporates certain Articles of the Vienna Convention on Diplomatic Relation into domestic law in the Schedule:

(a) article 1(e) states that a 'diplomatic agent is the 'head of the mission or a member of the diplomatic staff of the mission';

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(b) article 29 states that the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity; and

(c) article 31(1) guarantees that a diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.

[24] Therefore, the applicant contended that as the former director and high officer of the International Organization ('AIAC'), the applicant had the status of a diplomatic agent. He is conferred and vested with immunity from suit and from other legal process in respect of things done in his capacity as high officer even from criminal jurisdiction.

[25] The counsel for the applicant quoted the case of *Islamic Financial Services Board v Puan Marlin Fairol bt Mohd Faroque and Anor* [2010] MLJU 653; [2010] 8 CLJ 173, HC Ariff Yusof J (as His Lordship then was) considered the application by the Islamic Financial Services Board ('IFSB') for judicial review to quash the award of the Industrial Court. The court held at paras 40–44 that the words 'legal process' are couched in very wide terms, to include proceedings in a proper court of law, but they do not exclude other forms of lawful process. Accordingly, proceedings before the Industrial Court were held to be caught by the immunity and the Industrial Court's award was quashed.

[26] A similar conclusion was reached by the Court of Appeal in respect of the AIAC itself in the case of *Regional Centre for Arbitration v Ooi Beng Choo & Anor* (unreported, Civil Appeal No W-01–160 of 1998, Court of Appeal decision dated 2 August 1999) where the Court of Appeal held that the Regional Centre for Arbitration is immune from suit and legal process which includes a reference to the Industrial Court of a complain of a dismissal under the Industrial Relations Act 1967.

Issue of waiver of immunity

[27] The counsel for the applicant further submitted that issues pertaining to waiver of immunites and privileges are governed by s 8A of Act 485.

[28] It was argued that on a proper interpretation of the statute, the applicant's immunity cannot be waived at all, as he is not a 'representative, official or expert' of either AALCO or the AIAC. Even if his immunity can be waived, the power to do so is vested in AALCO. In fact, the respondents, through the first respondent, had already sent a letter to AALCO requesting for a waiver of the applicant's immunity. This request however was rejected by AALCO's Secretary General by his letter dated 22 March 2019.

[29] Therefore, the applicant contended that the respondents recognised the privileges and immunities of the applicant and the respondents took the

position that before the applicant's privileges and immunities can be removed, they would have to be waived by AALCO. In this matter, AALCO has decided not to waive the applicant's immunity.

Immunity is not lost even if action are for personal benefit

[30] Section 8A of Act 485 sets out the circumstances in which the privileges and immunities under Act 485 can and should be waived, and the considerations that ought to apply. Section 8A(1) begins the section by pointing out that the privileges and immunities conferred by Act 485 are granted in the interest of the international organisation and not for the personal benefit of the individuals. It is in this context that the words 'not for the personal benefit' of the individual concerned is used.

[31] The applicant further contended that the applicant is not limited by the words 'not for his personal benefit'.Things can still be done within his capacity as High Officer of the AIAC even if he derived personal benefit from those actions.

[32] In the present case, AALCO has categorically protested the bringing of charges against the applicant. AALCO obviously take the view that the purchase and distribution of a book on international arbitration, authored by the applicant, and widely regarded not only as the leading textbook on arbitration law in Malaysia but also as a valuable contribution internationally to arbitration law, cannot be anything but an activity in furtherance of the interest of AALCO and the AIAC.

[33] The objectives of the AIAC is to 'promote the growth and effective functioning of national arbitration institutions' and 'to promote the wider use and application of the UNCITRAL Arbitration Rules of 1976 within the Asian and Pacific Region' and with one of its functions to 'promote international commercial arbitration in the region served by it' (see cl 1, 1981 host country agreement). There is no authority which states that the immunity of diplomatic officers for acts done in their official capacity are suddenly excluded just because those actions also benefit them personally.

Issue of whether public prosecutor's decision is amenable to judicial review

[34] It is submitted that based on the decision in *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443, the discretionary power vested in the second respondent, whether by way of statute or prerogative, is subject to legal limits. The second respondent as a public officer must act according to the law.

[35] The Federal Court in *Chin Chee Kow*'s case at paras 81–82 also referred to the cases of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lembah Enterprise Sdn Bhd* [1979] 1 MLJ 135 for the established principles that:

(a) the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of our Federal Constitution; and

(b) every legal power must have legal limits and that every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard so that the courts can see that these great powers and influence are exercised in accordance with law. Public bodies must be compelled to observe the law.

[36] Therefore, based on the authorities above and the legal principles highlighted, the applicant further submitted that the second respondent's discretionary power to prefer charges against the applicant under the criminal jurisdiction of the state must be subject to the privileges and immunities conferred upon and vested with the applicant in the various domestic laws and regulations referred to above. Hence the actions of the respondents are without jurisdiction and in breach of the law.

The respondents' submissions

Immunity

[37] The respondents averred that the immunity afforded to the applicant is not a blanket immunity. The unequivocal wordings of Part II of the Second Schedule to Act 485 make it patently clear that the privileges and immunities granted to the applicant, as former high officer, is limited to acts and things done in his capacity as such an officer.

[38] It is the respondents' submission that the applicant is not a diplomatic agent. The scope of his immunity is as provided in Part II of the Second Schedule to Act 485, and nothing more. He is not a diplomatic agent and therefore the privileges and immunities provided under Act 636 does not apply to the applicant.

[39] It is further submitted that the exercise of that prosecutorial power is not justiciable. Therefore the court should decline the applicant's invitation to review the second respondent's decision to initiate criminal proceedings against

A the applicant. Having regard to all the facts and circumstances including the provisions relating to the applicant's immunity, the applicant is not immune from the criminal charges preferred against him.

B **[40]** The respondents further argued that the question of whether the applicant is immune or not, can only be determined when the evidence in support of the criminal charges is adduced in the sessions court.

The second respondent's prosecutorial powers are not amenable to judicial review

C **[41]** The respondents emphasised that according to art 145(3) of the Federal Constitution which confers the prosecutorial powers to the second respondent reads:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court martial.

D Thus, the decision of the second respondent to institute, conduct or discontinue criminal proceedings is not justiciable or amenable to judicial review.

E **[42]** To support the respondents' contention, several cases have been referred by the respondents which are as follows:

F (a) *Long bin Samat v Public Prosecutor* [1974] 2 MLJ 152 (FC) wherein Suffian LP held at p 158:

> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32–3 in *Smedleys Ltd v Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.
>
> Anyone who is dissatisfied with the Attorney-general's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

(b) *Dato' Seri Anwar Ibrahim v Mohamad Hanafiah bin Hj Zakaria & Ors* [2010] 2 MLJ 271 (HC) at p 283, it was held that:

> [21] Further, I agree with senior federal counsel that the civil court exercising its administrative law function is not the proper forum to review a written statement issued for the purpose of a trial pending in the criminal court. It is an abuse of process to seek the aid of the civil court to review the written statement and to direct the first respondent to issue a new written statement. The civil court has no jurisdiction to review any act of the public prosecutor undertaken in the discharge of his obligations under the CPC. Any challenge ought to be raised in the criminal court exercising its criminal jurisdiction (*Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12). To allow this application would mean the civil court interfering with the jurisdiction of the criminal court (*Tan Sri Eric Chia v Attorney General* [2005] 4 MLJ 433).

[43] The respondents averred that the plethora of cases decided by the appellate and apex courts have consistently held that the second respondent's prosecutorial power under the Federal Constitution is non-justiciable for a myriad of reasons including policy consideration and separation of powers. There is no valid reason for this court to depart from this principle. The applicant has not given this court any reason to justify such a move.

[44] The respondents also urged this court to decline the applicant's invitation to mould him a new relief by the charges brought against him.

FINDINGS OF COURT

The law in relation to judicial review

[45] It is trite law that in judicial review application, the decision of inferior tribunal may be reviewed by the court on the grounds of 'illegality', 'irrationality' and 'procedural impropriety' which permits this court to scrutinise the decision not only for process but also for substance of the case as illustrated by the Federal Court in *R Rama Chandran v Industrial Court Malaysia & Anor* [1997] 1 MLJ 145 at pp 186–187; [1997] 1 CLJ 147 at pp 171–172 (FC) Edgar Joseph Jr FCJ in his judgment had said this:

> In allowing the appeal on the grounds aforesaid, it is self-evident that we had reviewed the award of the Industrial Court for substance as well as process. First of all, I should like to examine the legal basis upon which we had done so, and it is this topic which I shall now address, before I turn to consider the question of whether we have power to grant remedies by way of consequential orders, referred to in the second paragraph of this judgment.
>
> It is often said that judicial review is concerned not with the decision but the decision-making process. (See, eg *Chief Constable of North Wales v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which

A he has been subjected. Put differently, in the words of Lord

Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, where the impugned decision is flawed on the ground of *procedural impropriety.*

B But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear *that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinise such decisions not only for process, but also for substance.* (Emphasis added.)

C **[46]** The court also refers to the case of *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 6 MLJ 468; [2013] 8 CLJ 890 wherein the Court of Appeal held that (which has been affirmed by the Federal Court):

D [69] ... the decision maker must consider matters required to be considered and disregard irrelevant collateral matters and the decision must be within the perimeters of the statutory powers given to the decision maker on the matter. It goes without saying therefore if the decision is made in compliance with these principles and requirements such decision cannot be said to be unreasonable and is unassailable. *But if the exercise of the discretion is made in contravention of any law or*

E *that the decision maker has taken into consideration irrelevant matters or that the decision maker has acted in excess of powers conferred upon him in respect of the matter which he decided or that the decision militates against the object of the statute, then the court can intervene and strike down the decision as unreasonable and unlawful.* (Emphasis added.)

F

[47] There are two main issues that need to be dealt with by this court in the present case namely issues on the applicant's immunity and whether the decision of the second respondent is amendable to judicial review. Before elaborating further, it is essential to refer to the legal

G documentations/statutes/regulations concerning this present case.

[48] Firstly, the 2013 host country agreement entered between the fourth respondent and AALCO for the establishment of KLRCA. Bear in mind that this 2013 host agreement was entered by the abovenamed parties on 26 March

H 2013. Subsequently, on 7 February 2018, both parties entered into a supplementary agreement in which, among others, renamed KLRCA as AIAC.

[49] It is pertinent to note that with regard to the immunity clause, the 2013 host country agreement had specifically made a reference to the Act 485. In

I 2011, ie two years before the signing of the 2013 host country agreement took place, Act 485 has been amended to insert certain clauses which came into operation on 16 September 2011.

[50] Act 485, amongst others, empowers the Minister to make regulation

pertaining to privileges and immunities of certain international organisations and persons. Hence, the 1996 Regulations has been enacted. The said 1996 Regulations was amended in 2011 to insert certain clauses pertaining to immunity. A reference also has been made to Act 636 in determining the extension of the applicant's immunity against the alleged commission of crime charged against him.

Immunity

[51] It is undisputed fact that the applicant has been appointed as the Director of the Centre from 1 March 2010 until his resignation on 21 November 2018. The crux of the applicant's application here hinges on the applicant's immunity pursuant to Second Schedule of Act 485 which mentioned the immunities conferred to the high officer and former high officer.

[52] The applicant contended that he is entitled to claim immunity against the charges preferred against him being the fact that he was the Director of the Centre ie a high officer of an international organisation as defined under the said 2011 Regulations. As such, pursuant to the 2013 host country agreement and the said 2011 Regulations, the immunity conferred under Second Schedule of Act 485 is applicable to him.

[53] However, the real question to be decided by the court is what type of immunity that should be conferred to the applicant and to what extent such immunities are applicable. This is because Act 485 has specifically differentiated the immunities given to the high officer and former high officer in which the former enjoy the same immunities as given to the diplomatic agents whilst the latter enjoy immunities from suit and other legal process in respect of acts and things done in his capacity as such an officer.

[54] The applicant claimed that since the commission of the alleged offences took place while he is still the High Officer of the Centre, then he should be entitled to immunity as accorded to the diplomatic agent. On the other hand, the respondents averred that the applicant only entitled for immunity given to the former high officer due to the fact that he was charged after he tendered his resignation and no longer hold the post as the Director of the Centre.

[55] To answer this question, the court must take a closer look at the 2013 host country agreement as well as the relevant statutes and regulations. Under article III para 6 of the 2013 host country agreement, it is clearly stated as follows:

6. The Director of the Centre, *if he is a citizen of Malaysia, shall be entitled to such*

privileges and immunities as determined by the Minister pursuant to Act 485. (Emphasis added.)

[56] It is to be noted that under s 4(7) of Act 485 it is expressly stated that:

7. A high officer or an officer of an international organization who is a Malaysian citizen is not entitled under this section to any of the privileges or immunities in the Second and Fourth Schedules respectively, except in respect of acts and things done in his capacity as such an officer.

[57] Second Schedule of Act 485 spells out the immunities conferred to the high officer and former high officer as follows:

Second Schedule [Section 4]

Part I

PRIVILEGES AND IMMUNITIES

OF HIGH OFFICER OF

INTERNATIONAL

ORGANIZATION

'The like privileges and immunities (including privileges and immunities in respect of a spouse and children under the age of twenty-one years) as are accorded to a diplomatic agent.'

Part II

IMMUNITIES OF FORMER HIGH OFFICER OF INTERNATIONAL ORGANIZATION

Immunity from suit and from other legal process in respect of acts and things done in his capacity as such an officer.

[58] Regulation 3A of the Regulations 2011 provides as follows:

3A(1) A High Officer, if he is not a citizen of Malaysia shall have the privileges and immunities as specified in Part 1 of the Second Schedule to the Act.

(2) *A High Officer, if he is a citizen of Malaysia, shall only be entitled to the privileges and immunities in respect of acts and things done in his capacity as the High Officer*.

(3) *A former High Officer shall have the immunities specified in Part II of the Second Schedule to the Act*. (Emphasis added.)

[59] As mentioned earlier, the signing of the 2013 host country agreement took place after Act 485 has been amended in 2011 which includes amongst others, the insertion of s 4(7) above. Further, Regulation 3A of the 2011 Regulations must be read together with the provisions under the parent Act ie Act 485. Thus, in order to determine whether the applicant is entitled for

immunity or otherwise, the provisions under the 2013 host country agreement and the 2011 Regulations should be read together with Act 485, in particular s 4(7) of Act 485. From the plain reading of s 4(7) of Act 485, generally there is no immunity to be accorded to the high officer or officer of an international organisation if he is a citizen of Malaysia except in respect of 'acts and things done in his capacity as such an officer'.

[60] As such, since the applicant is a Malaysian citizen and both parties ie the fourth respondent and AALCO agreed to be bound by the provisions in the 2013 host country agreement which is subjected to Act 485 (in particular s 4(7)), therefore the privileges or immunities in the Second and Fourth Schedules are still applicable provided the acts or things done was in his capacity as such an officer.

[61] It is undisputed fact that the applicant was a director of AIAC at the time he was arrested (ie 20 November 2018) and thereafter was forced to resign as director on 21 November 2018. The applicant then became a former high officer after his resignation. Pursuant to s 4(1)(b)(ii) of Act 485, the applicant still enjoy immunities as provided under Part II of the Schedule.

[62] In addition to that, the applicant in his amended statement only sought for a declaration as a former high officer and thus parties are bound by their pleadings. Further, the applicant contended that in the event that he is not be accorded with the immunity as a high officer, but definitely he is entitled for immunity accorded as a former high officer as provided under Part II, Second Schedule of Act 485. The respondents on the other hand contended that the immunity accorded to the former high officer is not as the same as what has been accorded to the high officer ie a qualified immunities which does not exempt him from criminal prosecution.

[63] The reasoning behind this is because the scope and extent of immunities given to the high officer is the same as enjoy by the diplomatic agent. Under s 2 of Act 485, diplomatic agent has been defined as '... assigned to it by the Diplomatic Privileges (Vienna Convention) Act 1966 (Act 636)'.

[64] Article 31 of Act 636 provides immunities for diplomatic agent as follows:

> Article 31
>
> 11. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of —
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the

sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

21. A diplomatic agent is not obliged to give evidence as a witness.

31. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a),(b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

41. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State. On the contrary, the immunities given to the former High Officer only to the extent that he is immune from suit or other legal process.

[65] On the contrary, the immunities given to the former high officer only to the extent that he is immune from suit or other legal process. On this point, the applicant argued that other legal process also includes criminal jurisdiction/process. To rebut the applicant's contention, the respondents invited the court to look into the Hansard of the Parliament during the second reading of Act 485 and submitted that such immunity does not give him the exemption from criminal jurisdiction.

[66] After careful reading of the Hansard with caution that it is only for guidance and not binding to the court, the intention of the Parliament in enacting Act 485 is not to give absolute immunity to all officers or staff of an international organisation except for the high officer only. This can be taken from the reply by the Deputy Minister as follows:

> Ingin saya tekankan di sini bahawasanya, ini pun dibangkitkan oleh Ahli Yang Berhormat dari Parit Sulong tentang masalah-masalah pengintipan (spying), subversif dan sebagainya. Walaupun kita memberi keistimewaan dan kekebalan kepada orang yang tertentu tetapi tidaklah pada keseluruhannya ataupun seluas-luasnya seperti yang dianggapkan oleh Ahli Yang Berhormat yang berkenaan. Contohnya, setiap keistimewaan dan kekebalan itu kita buat mengikut perjanjian dan hubungan kita dengan negara yang berkenaan ataupun agensi-agensi antarabangsa yang berkenaan. Walaupun disenaraikan dalam Rang Undang-undang ini berbagai-bagai keistimewaan dan kekebalan tetapi tidak semuanya diberi secara umum begitu sahaja tetapi mengikut negara yang tertentu ataupun agensi yang tertentu. Kita hanya reciprocate apa yang kita dapat oleh negara yang berkenaan, tidak kurang dan tidak lebih daripada itu, *malah biasanya pegawai yang tertinggi sahaja yang mendapat kebanyakan keistimewaan dan*

kekebalan yang tertentu. Pegawai-pegawai atau kakitangan yang lain tidak mendapat keseluruhannya keistimewaan dan kekebalan kerana mereka tertakluk kepada undang-undang jenayah negara kita. (Emphasis added.)

[67] What can be implied from the above is that, generally, only the high officer will enjoy most of the immunities. That is why the court believed that the wording in Part I and Part II of the Second Schedule of Act 485 has been crafted and distinguished from one another. This shows that the Parliament intended to differentiate the immunities enjoy by the high officer and former high officer. The Parliament even had separated the Second Schedule of Act 485 into two parts namely Part I which deals with immunities accorded to high officer and Part II which deals with immunities accorded to former high officer. For the court not to appreciate the distinctive approach taken by the Parliament to distinguish the two, it will disregard the true intention of the Parliament.

[68] The immunity that guaranteed by Part II of the Second Schedule Act 485 is that the applicant is immune from suit and other legal process in respect of acts and things done in his capacity as such an officer. The court refers to *Stroud's JUDICIAL DICTIONARY of Word and Phrases* (5th Ed, Vol 4) by London Sweet & Maxwell Limited 1986 the word 'process' means:

PROCESS (2)— 'Process' is the doing of something in a proceeding in a civil or criminal court, and that which may be done without the aid of a court is not a 'process'.

[69] In the case of *Islamic Financial Services Board,* the Islamic Financial Services Board contended that it was an international organisation, vested with privileges and immunities under s 7 of the Islamic Financial Services Board Act 2002 ('the IFSB Act'), reg 2 and the Schedule to the IFSB Act which, inter alia, provided 'immunity from suit and other legal process'.

[70] In the same case, Ariff Yusof J (as His Lordship then was) held (at paras 40–44) that the words 'legal process' are couched in a very wide terms, to include proceedings in a proper court of law, but they do not exclude other forms of lawful process. Accordingly, proceedings before the Industrial Court were held to be caught by the immunity and the Industrial Court's award was quashed.

[71] I agree with the applicant's learned counsel submission that legal process means civil and criminal process. I am of the view that if Parliament has intended to exclude the immunity from criminal process then it has to be specifically spelled out in Part II of the Second Schedule of Act 485. It is also my considered view that the limits of immunities provided for a former high officer is very clear that he is immune from suit and other legal process in respect of

acts and things done in his capacity as such an officer unlike a high officer who enjoy privileges and immunities as are accorded to a diplomatic agent.

ISSUE OF WAIVER OF IMMUNITY

[72] The question is whether the immunity can be waived and if it is so who then has the power to waive such immunity. Coming back to the 2013 host country agreement itself, there is nowhere in the agreement provides an avenue for any party to request for a waiver of immunity. According to article IX of the same, any difference or dispute between parties shall be settled amicably through mutual consultation and/or negotiations between parties without reference to any third party or international tribunal. Furthermore, article VIII gives each party reserves the right for reasons of national security, national interest, public order or public health to suspend temporarily, either in whole or in part, the implementation of this agreement which suspension shall take effect immediately after notification has been given to the party through diplomatic channels.

[73] In the present case, the court is of the view that the immunity was never cancelled or challenged, thus the immunity conferred on the applicant remains. The issue of waiver of privileges and immunities is covered by s 8A of Act 485. It provides as follows;

> 8A Proper use of privileges and immunities
>
> (1) The privileges and immunities conferred under this Act are granted in the interests of the international organization and overseas organization and not for the personal benefit of the individuals.
>
> (2) The appropriate authority of the respective international organization and overseas organization shall have the right and the duty to waive the privileges and immunities of any of its representatives, officials or experts in any case where, in its opinion, such privileges and immunities would impede the course of justice and could be waived without prejudice to the interest of the organization and overseas organization.

[74] This court is of the view that the applicant was the representatives of the international organisation under the auspices of the AALCO. As can be seen in article IV(1) of the 2013 host country agreement, the centre shall be administered by a Director who shall be a national of Malaysia and shall be appointed by the host government in consultation with the Secretary-General of the Organisation.

[75] Section 8A(2) provides the power to waive the privileges and immunities lies with the authority of the respective international organisation and overseas organisation that is AALCO. The respondents through the first

respondent had already sent a letter to AALCO requesting for a waiver of the applicant's immunity and the request was rejected by AALCO's Secretary General by his letter dated 22 March 2019. AALCO's decision was not to waive the said immunity. The court refers to paras 51–52 of the said letter and stated as follows:

> AALCO's Position
>
> 51. In the premises, and for the time being, I have no other options but to respectfully refuse the agreement of AALCO to waive Datuk Sundra Rajoo s/o Nadarajah's immunities as the former High Officer of AIAC under Article III(6) of the Host Country Agreement from criminal jurisdiction of Malaysia.
>
> 52. All AALCO's rights, privileges and immunities are reserved.

(Applicant's fourth affidavit, encl 14, exh NS1, p 10, paras 51–52)

[76] This court agreed with the applicant's submission that the respondents recognise the privileges and immunities of the applicant. The respondents took the position that before the applicant's privileges and immunities can be removed, they would have to be waived by AALCO and AALCO has decided not to waive the applicant's immunity. In such circumstances, the applicant's immunity provided under Second Schedule of Act 485 is still maintained till to date.

[77] On this issue, the court is of the considered opinion that it is trite law that parties are bound by the terms of the agreement that has been entered mutually. In other word, all the terms/articles in the said 2013 host country agreement must be honoured by the parties including the fourth respondent. It is expressly stated in article I para 3 of the 2013 host country agreement that the host government shall respect the independent functioning of the centre whereas article IX of the same agreement also clearly stated that any dispute between the parties shall be settled amicably through mutual consultation and/or negotiations between the parties, without reference to any third party or international tribunal.

[78] The 2013 host country agreement also provide specific clause of immunities conferred to the high officer which must be read together with Act 485. With regard to the applicant's immunity as far as s 4(7) of Act 485 is concerned, there is evidence from AALCO through its letter which condoned that the acts and things done which formed the charges levelled against the applicant were in fact done in the applicant's capacity as such an officer. The court cannot simply disregard such evidence as it is from the organisation which has the sole power to waive the immunity given to the applicant under the 2013 host country agreement.

[79] Another point raised by the respondents is that the applicant cannot claimed the immunities conferred upon him under Act 485 due to the fact that the alleged acts and things in question was done for his personal benefit and not for the benefit of the centre as provided under s 8A of Act 485. To rebut this proposition taken by the respondents, the applicant argued that he never took the profit from the sales of his book which were purchased by the centre and had in fact refund the same to the centre. Unfortunately, this evidence was never rebutted by the respondents.

ISSUE WHETHER THE PUBLIC PROSECUTOR'S DECISION IS AMENDABLE TO JUDICIAL REVIEW

[80] Article 145(3) of the Federal Constitution gives unfettered discretion to the second respondent to institute, conduct or discontinue any proceedings for criminal offence. Article 145(3) expressly provides as follow:

> (3) The Attorney General shall have power, *exercisable at his discretion*, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial. (Emphasis added.)

[81] The Singapore Court of Appeal in *Tan Seet Eng v Attorney General and another matter* [2016] 1 SLR 779, held:

> [2] This is not new law. The underlying principle was aptly stated by Wee Chong Jin CJ almost three decades ago in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 ('Chng Suan Tze') at [86]:
>
> > [T]he notion of a subjective or unfettered discretion is contrary to the rule of law. *All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the Executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be ultra vires the Act and a court of law must be able to hold it to be so.* ... It must be clear therefore that the boundaries of the decision maker's jurisdiction as conferred by an Act of Parliament is a question solely for the courts to decide. ... Further, it is ... no answer to refer to accountability to Parliament as an alternative safeguard. ... (Emphasis added.)

[82] Further, the court refers to the recent Federal Court's decision in the case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* where the Federal Court had referred to and applied several authorities from various jurisdictions which shows that the public prosecutor's discretion to bring prosecutions is not something that is outside the scope of judicial review. The Federal Court held that:

(1) *The AG's power* to give consent or otherwise under Section 9(1) of the

Government Proceedings Act 1956 *was not absolute and was subject to legal limits. Unfettered discretion was contradictory to the rule of law*. A

(2) ...

(3) *The court could not agree with the contention that the orthodox common law immunity from judicial review of the AG's prerogative powers* laid down in *Gouriet v Union of Post Office Workers* [1978] AC 435 was still good law in view of the House of Lord's decision in Council of *Civil Servoce Unions v Minister for Civil Service* [1985] AC 374. *This latter landmark decision moved the courts from a position of deciding whether prerogative power existed to decide if they were being carried out lawfully.* The judgment of Gouriet's case was a reflection of past judicial refusal to enquire into the way in which a prerogative power has been exercised. *With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power*. The present position was that the AG was no longer regarded as the sole guardian of what was public interest, which was a central principle in the decision in Gouriet's case. (Emphasis added.) B C D

[83] The Federal Court in *Chin Chee Kow*'s case also referred to a Privy Council case of *Mohit v The Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 where the Privy Council held at p 3349 that: E

There is no doubt that the Director's decision to institute and undertake or take over criminal proceedings against any suspect, to discontinue any such proceedings in any manners is an administrative decision and such could be liable to be reviewed by the courts. F

And at p 3350:

Recognition of a right to challenge the DPP's decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP's decision are made out, it involves the courts in requiring the decision to be made in (as the case may be) a lawful, proper or rational manner. G

And finally, at p 3353:

If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. It is unnecessary to discuss what exceptions there may be to this rule, which now represents the ordinary if not the invariable rule. Thus the Board should approach the present issue on the assumption that the powers conferred on the DPP by section 72(3) of the Constitution are subject to judicial review, whatever the standard of review may be, unless there is some compelling reason to infer that such an assumption is excluded. What compelling reason is there in a case such as this? (Emphasis added.) H I

[84] The Federal Court also referred the case of *Semenyih Jaya Sdn Bhd v*

Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561 (FC) for the established principles that the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Federal Constitution. Every legal power must have legal limits and that every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. When government departments and public authorities have such great powers and influence, this is a most important safeguard so that the courts can see that these great powers and influence are exercised in accordance with law. Public bodies must be compelled to observe the law. There is no exception to the second respondent as public officer must act the same.

[85] This court agree with the applicant's counsel submission that the real basis of the decision in *Chin Chee Kow*'s case is that a discretionary power vested in the second respondent, whether by way of statute or prerogative is subject to legal limits. The second respondent as a public officer must act according to law.

[86] Based on the authorities above and the legal principles highlighted, this court is of the opinion that the second respondent's discretionary power to prefer charges against the applicant under the criminal jurisdiction of the state must be subject to the privileges and immunities conferred upon and vested with the applicant in the various domestic laws and regulations referred to above.

WHETHER THIS COURT IS THE RIGHT FORUM FOR JUDICIAL REVIEW

[87] It is the submission of the respondents that the question of whether the applicant is immune or not, can only be determined when the evidence in support of the criminal charges is adduced in the sessions court. The court refers to O 53 r 2(4) of the Rules of Court 2012 provides that:

> Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

[88] The applicant averred that despite the applicant being arrested and investigated in November, and despite the application for judicial review being filed in early March, the respondents only began taking steps to bring charges against the applicant late on Friday evening and over the weekend before the leave application was due to be heard on Tuesday morning. No explanation had been given as to why the second respondent and the third respondent could not wait until the AALCO's Secretary General had responded to their letters seeking waiver, nor why they could not await the determination of the judicial

review application. As rightly pointed out by the learned applicant's counsel that this judicial review is in respect of not only the decision of the public prosecutor, but also 'things done in the exercise of a public function' by the first respondent, the third respondent and the second respondent.

[89] Further in the *Islamic Financial Services Board*'s case, the court held at para 16, p 181 that:

> [16] An issue on jurisdiction of this nature, namely immunity from suit of from legal process, is a question of law which properly speaking should be taken at the outset and without needing to hear the merits of any particular application or suit. Logically, if there is a blanket immunity for any tribunal to even proceed to hear, that tribunal should decline this preliminary issue without proceeding any further on the merits.

The *Islamic Financial Services Board*'s case hold that the question of immunity was a legal question to be determined that did not require a trial.

[90] The applicant in this case alleged that the respondents are acting in excess of their jurisdiction and this court is thus being asked to exercise its supervisory jurisdiction, acting as a constitutional body, to review the actions of the Executive branch of government. Based on the facts of the case, this court is of the considered view that the applicant has come to the right court to determine if the Executive branch of government has acted beyond its powers.

CONCLUSION

[91] After having considered the applicant's application and submissions of the parties, it is the finding of this court that:

(a) the applicant was a director of AIAC and now a former High Officer of the AIAC;

(b) the applicant is conferred by law 'immunity from suit and from other legal process' in respect of acts and things done in his capacity as such officer as provided under Part II of the Second Schedule of Act 485;

(c) other legal process means civil and criminal process;

(d) the second respondent's decision is amendable to judicial review;

(e) the second respondent's discretionary power to prefer charges against the applicant under the criminal jurisdiction of the state must be subject to the privileges and immunities conferred upon and vested with the applicant in the various domestic laws and regulations; and

A (f) the applicant is immune from any legal process and the criminal action taken against him by the respondents is contravene with Act 485 and is therefore unlawful, irrational and void and thus should be quashed.

B **[92]** Accordingly, the court allowed the applicant's application for judicial review and ordered no costs.

Application allowed.

Reported by Ahmad Ismail Illman Mohd Razali

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